U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 15 September 2003

BALCA Case No.: 2002-INA-216
ETA Case No.: P2000-CA-09494990/LA

In the Matter of:

MICHAEL'S STORES, INC.,
Employer,

on behalf of

ESTRELLITA MACALINDONG,
Alien.

Certifying Officer: Martin Rios
San Francisco, CA

Appearances: Josue S. Villanueva, Esquire
Glendale, CA
For Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM: This case arises from an application for labor certification[1] filed by a retail arts and crafts store for the position of Floral Sales Associate. (AF 103-104).[2] The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File ("AF").

[1] Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2] "AF" is an abbreviation for Appeal File.

STATEMENT OF THE CASE

On January 7, 1998, Employer, Michael's Stores Inc., filed an application for alien employment certification on behalf of the Alien, Estrellita Macalindong, to fill the position of Floral Sales Associate. Minimum requirements for the position were listed as six months' experience in the job offered.[3] (AF 103-104).

Employer received one applicant referral in response to its recruitment efforts. That applicant was rejected for failure to respond to a certified letter and follow-up phone call. (AF 108, 115).

A Notice of Findings (NOF) was issued by the Certifying Officer (CO) on January 23, 2002, citing sections 20 C.F.R. §§ 656.20(c)(8) and 656.3, and questioning the existence of a bona fide full-time job opportunity open to U.S. workers. (AF 94-101). The CO noted that the Alien's work history with Michael's Stores has been part-time according to the information provided by Employer's bookkeeper (AF 125), and that anything less than full-time employment is not certifiable under any circumstances. Accordingly, Employer was instructed to explain how a part-time position that has been occupied by the beneficiary since October 1995 to the present becomes full-time employment, performing the same duties. The CO further advised:

> To substantiate its explanation, the employer should submit documentation to support any assertions made. For example, if the employer alleges the business has increased, evidence such as company Federal tax returns for 1999, 2000, and 2001 should be submitted as well as copies of invoices, sales slips, special orders, purchase orders of supplies, etc. If hours of the position in question have increased, substantiate the increased hours with copies of the beneficiary's time sheets showing the daily/weekly hours worked for the two-year period, January 1999 through December 2000.

[3] Employer initially required two years experience, which was later amended to six months.

In Rebuttal, Employer acknowledged that the Alien had been working 25 to 30 hour weeks since 1995 because she works full-time with another employer, but reiterated its intention to hire her on a full-time basis once her immigrant petition was approved. In further support of its assertion that the job offer is for a full-time permanent position, Employer cited item 11 of ETA 750 Part A, as amended, which "unmistakably offers to the beneficiary a full-time employment;" provided a brief explanation of Michael's Stores, Inc., on a national level; and provided copies of its annual reports, news releases, and stock market information. (AF 8-93).

A Final Determination denying labor certification was issued by the CO on March 25, 2002, based upon a finding that Employer had failed to submit any documentation demonstrating that that the job in question has changed from part-time to full-time. Noting that he provided specific examples of acceptable substantiating documentation to Employer, the CO determined that Employer's blanket statement that the Alien will be hired full-time, along with the submission of documentation pertaining to Michael's Stores, Inc. nationally, failed to substantiate that the position is full-time. Accordingly, labor certification was denied. (AF 5-6).

Employer filed a Request for Review by letter dated April 22, 2002. (AF 1-4). The matter was referred to and docketed in this Office on June 13, 2002. (AF 1-7). Employer submitted an Appellant's Brief/Statement of Position on July 3, 2002.

DISCUSSION

Congress enacted Section 212(a)(14) of the Immigration and Nationality Act of 1952 (as amended by Section 212(a)(5) of the Immigration Act of 1990 and recodified at 8 U.S.C. § 1182(a)(5)(A)) for the purpose of excluding aliens competing for jobs that United States workers could fill and to "protect the American labor market from an influx of both skilled and unskilled foreign labor." *Cheung v. District Director, INS*, 641 F2d.

666, 669 (9th Cir., 1981); *Wang v. INS*, 602 F.2d 211, 213 (9th Cir. 1979).[4] To effectuate the intent of Congress, regulations were promulgated to carry out the statutory preference favoring domestic workers whenever possible. Consequently, the burden of proof in the labor certification process is on the employer. *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Marsha Edelman*, 1994-INA-537 (Mar. 1, 1996); 20 C.F.R. § 656.2(b). Moreover, as was noted by the Board of Alien Labor Certification Appeals in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*), "[u]nder the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued."

The Board in *Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*), held that if the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. An employer's failure to produce a relevant and reasonably obtainable document requested by the CO is grounds for the denial of certification. *STLO Corporation*, 1990-INA-7 (Sept. 9, 1991); *Oconee Center Mental Retardation Services*, 1988-INA-40 (July 5, 1988). The denial of certification is not appropriate, however, if the CO requests documentation which is difficult to obtain and the employer submits other evidence sufficient to rebut the CO's challenge. *Engineering Measurement Co.*, 1990-INA-171 (Mar. 29, 1991).

In the NOF, the CO was specific in his request for documentation to support any assertions. Noting that the Alien has performed the duties of the petitioned position on a part-time basis for the past seven years, the CO requested that Employer document its change to a full-time position. The CO provided specific examples of substantiating documentation, documents that should have been easily obtainable and which have a direct bearing on the resolution of this issue. *Gencorp*. As was noted by the CO in his determination to deny certification, Employer failed to submit any of the documentation

[4] The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. *See* S. Rep. No. 748, 89th Cong., lst Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News 3333-3334.

requested. Rather than documentation specific to the petitioning Employer, the only documentation submitted was annual reports and news releases of Michael's Stores, Inc., nationally.

Given Employer's failure to produce the documentation requested, and Employer's failure to submit alternative adequate documentation, we conclude that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.